88-1177

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MUSTANG FUEL CORPORATION (formerly MUSTANG ENERGY CORP.),
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, et al.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

This case is the first judicial review of Federal Energy Regulatory Commission ("Commission") orders purporting to fix "fair and equitable" rates under Section 311(a)(2) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3371(a)(2), for natural gas transportation by an intrastate pipeline for an interstate pipeline. Section 311(a)(2) requires, *inter alia*, rates that "reasonably compensate" for "expenses incurred" and provide an "opportunity . . . to earn a reasonable profit" (15 U.S.C. § 3371(a)(2)(B)(ii)). Petitioner, an intrastate pipeline transporting for an interstate pipeline, asserted before the court below that the Commission, in violation of Section 311(a)(2) rate standards and constitutional requirements, had reduced rates and ordered confiscatory refunds because of the combined impact of (1) application, retroactively, of a new hybrid method to reduce rates for past periods; and (2) abrogation, retroactively, of a minimum volume billing provision in the contract between Petitioner and the interstate pipeline customer. The court of appeals disagreed and affirmed the Commission on these issues, remanding only for correction of Commission error in the "actual costs" used for the later of two rate periods involved.

Questions presented are:

1. Whether the Commission misinterpreted, misapplied, and violated standards of Section 311(a)(2) of the NGPA by denial of an intrastate pipeline's recovery of "expenses incurred" and a "reasonable profit" for transportation of natural gas for an interstate pipeline as a direct result of simultaneous (i) retroactive application of new, previously unannounced methods for costs allocation and fixing rates, and (ii) retroactive abrogation of a contract provision permitting a monthly minimum volume charge to the interstate pipeline.

2. Whether the Commission misinterpreted, misapplied, and violated provisions of Section 311(a)(2)(B) of the NGPA which require rates for an intrastate pipeline to be "reasonably comparable" to rates permitted for interstate pipelines, and denied equal protection under the Constitution of the United States, by (i) imposing upon the intrastate pipeline all risks of failure of its interstate customer to project carriage volumes accurately and to use contracted, and projected service, but (ii) allowing in the past, currently, and for the future, interstate pipelines to "share" such risks with their customers by provisions in their tariffs having similar economic and billing effects.

3. Whether the Commission violated Section 311(a)(2) of the NGPA, and requirements of the Fifth Amendment to the Constitution of the United States for due process and nonconfiscatory rates, where the aggregate total impact and end results of retroactive reductions of filed rates, retroactive abrogation of a protective minimum volume charge, and payments of refunds ordered, are based upon:

(i) application to past periods of new, previously unannounced costs allocation and rate-making methods for interstate service without prior notice in time to have permitted timely commensurate costs reallocations and compensating changes of rates for the same past periods for intrastate service not subject to Commission jurisdiction;

(ii) retroactive total abrogation of the protection of a minimum volume charge previously permitted and effective during the past periods; and,

(iii) requirement of refunds payments which deprive the intrastate pipeline of recovery of "expenses incurred" and reasonable profit for the interstate service and exceed then current annual gross revenues for the interstate service and total net income from both interstate and intrastate services.

PARTIES TO THE PROCEEDING

Petitioner Mustang Fuel Corporation (Mustang Energy Corp. while this case was before the court of appeals) ("Mustang") was, during the agency proceedings, owner and operator of a large, extensive intrastate natural gas transportation system in Oklahoma originally serving only customers in that state. Mustang commenced transportation under Section 311(a)(2) of the NGPA for El Paso Natural Gas Company, an interstate pipeline and intervenor below, in September, 1981. In 1986, the system was sold and now is operated by Enogex, Inc., a wholly-owned subsidiary of Oklahoma Gas and Electric Company, which continues service for intrastate and interstate customers. Mustang remains responsible for rates and refunds, if any, for two rate periods covered by the court of appeals opinion and two subsequent rate periods still pending before the Commission (see App., 7a).*

Respondent Federal Energy Regulatory Commission has jurisdiction over transportation of natural gas in interstate comerce and sales of natural gas in interstate commerce for resale under the Natural Gas Act of 1938, 15 U.S.C. §§ 717, *et seq.*, ("NGA") and certain transportation and sales under the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301, *et seq.*, including transportation of natural gas by an intrastate pipeline on behalf of an interstate pipeline under Section 311(a)(2) of the Natural Gas Policy Act, 15 U.S.C. § 3371(a)(2).

El Paso Natural Gas Company, Mustang's interstate transportation customer, is a wholly-owned subsidiary of Burlington Resources Inc., and was an intervenor in the court below and in Commission proceedings.

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* In accordance with Rule 28.1, the list of Mustang Fuel Corporation's parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates is set forth in App., 104a.

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Mustang Fuel Corporation, formerly Mustang Energy Corp., ("Mustang") hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., 1a-31a) is reported at 859 F.2d 1447 (10th Cir. 1988).[1] The orders of the Federal Energy Regulatory Commission on review are reported at 31 F.E.R.C. (CCH) ¶ 61,265 (1985) (App. 34a-62a) and 36 F.E.R.C. (CCH) ¶ 61,001 (1986) (App., 63a-93a).

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[1] Appendices to this Petition are contained in a separate volume.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1988 (App., 32a-33a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and Section 506(a)(4) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3416(a)(4).

STATUTES AND REGULATIONS INVOLVED

Section 311(a)(2) of the NGPA, 15 U.S.C. § 3371 (a)(2), is set out at App., 94a-95a. Subpart C of Part 284 of the Regulations under the Natural Gas Policy Act of 1978, 18 C.F.R. §§ 284.121 *et seq.*, is set out at App., 96a-103a.

STATEMENT OF THE CASE

This case is the first judicial review of Federal Energy Regulatory Commission ("Commission") orders prescribing rates for an intrastate pipeline transporting natural gas on behalf of an interstate pipeline under substantive requirements of Section 311(a)(2) of the NGPA (See App., 8a-9a).

The Commission orders (1) changed methods previously used to design Mustang's rates and applied the new methods retroactively to reduce the filed rates (App., 40a-50a, 68a-72a); (2) abrogated, retroactively, the minimum volume charge for billing provided for in the contract between Mustang and its interstate pipeline customer (App., 34a, 52a-57a, 63a, 72a-80a); and (3) directed substantial refunds even though aggregate impact and end results of Commission actions, in combination, are to deprive Mustang of recovery of expenses incurred and a "reasonable profit" for the interstate pipeline service during the 1982-1984 rate periods subject to these orders (App., 68a-72a, 82a-84a).

The court of appeals affirmed the Commission on all questions as to lawfulness of these actions and results under substantive standards of the NGPA and constitutional requirements applicable to design and fixing of rates (App., 2a, 18a-24a, 25a-31a). The court remanded the case only to permit Commission correction of its erroneous use of the wrong "actual cost" data for the most recent rate period covered by the orders, a correction having only negligible change in the total dollar impact of the Commission orders (App. 24a-25a, 31a).

1. *Statutory Background.* Under Section 311(a)(2) of the NGPA, the Commission may authorize intrastate pipeline transportation of natural gas on behalf of an interstate pipeline or local distribution company, 15 U.S.C. § 3371(a)(2)(A) (App., 94a-95a). Maximum rates and charges for such service must be "fair and equitable" and not in excess of an amount "reasonably comparable" to rates and charges permitted for interstate pipelines for similar services (15 U.S.C. § 3371 (a)(2)(B)(i), App., 94a-95a). The Commission is directed to establish the method for calculating "an amount necessary" to: (1) reasonably compensate for "expenses incurred" in authorized services, and (2) provide "opportunity" for the intrastate pipeline "to earn a reasonable profit" on its services (15 U.S.C. § 3371 (a)(2)(B)(ii), App., 95a).

Section 311(a)(2) was intended by Congress to create development and integration of a national natural gas transportation network without subjecting intrastate pipelines to regulation under the Natural Gas Act of 1938, 15 U.S.C. §§ 717, *et seq.* ("NGA"). Under Section 311 (a)(2), the only operations of an intrastate pipeline subject to federal regulation thus are specific transactions for transportation on behalf of an interstate pipeline or a local distribution company (see App., 5a-6a).

Commission regulations implementing Section 311 (a)(2) provide that intrastate pipelines may elect to

base rates for interstate service on methodology used by, or rates on file with, their respective state regulatory agencies. If a pipeline does not so elect or is not state regulated (as is the case of Mustang), the pipeline must apply for Commission approval of rates under Section 311(a)(2). Upon filing a petition for such approval, the pipeline may begin service and charge the filed rates, subject to refund. For 150 days, the Commission then has discretion to permit those rates to be "deemed" consistent with substantive standards of Section 311(a)(2) or to initiate a "legislative-type," non-adjudicatory rate review proceeding and thereafter approve the filed rate or disapprove the rate and order refunds, with interest, of any amounts determined to be "excess" collections. See 18 C.F.R. § 284.123(b)(2); App., 98a; and App., 4a, n.1.

2. *The Mustang-El Paso Transportation Agreement.* Prior to 1981, Mustang provided natural gas transportation only for intrastate customers within Oklahoma. On January 9, 1981, Mustang contracted with El Paso Natural Gas Company ("El Paso"), an interstate pipeline, to provide transportation of natural gas to be purchased by El Paso in Oklahoma, then transported to El Paso's interstate system by two intrastate pipelines, and then further transported by El Paso and resold by El Paso in interstate commerce (App., 2a, 34a-35a). Under this contract, El Paso is required to provide annually to Mustang El Paso's projections of the volumes Mustang will be responsible for transporting for El Paso in the ensuing twelve months, the same procedures used by Mustang's intrastate transportation customers (App., 40a-42a).

Under the contract, Mustang's rates are computed and determined in steps: (1) El Paso provides its volume projections, and contemporaneous, similar twelve-month projections are provided by Oklahoma Gas and Electric Company ("OG&E"), Mustang's major intrastate custo-

mer;[2] (2) Mustang projects its total costs for the same future twelve-month periods, using past historical costs adjusted for known and anticipated changes; (3) the total of Mustang's projected costs then is allocated between OG&E and El Paso on the basis of the projected volumes provided to Mustang by them; and (4) precise unit rates per thousand cubic feet (Mcf) for the volumes to be transported for El Paso and for OG&E are determined by dividing the projected costs allocated to each of them by the projected transportation volumes supplied to Mustang by each of them (App., 41a-42a).

The Mustang-El Paso contract also provides for El Paso's review and possible change of its projected volumes and of Mustang's projected costs, at least annually, and for changes of Mustang's rates, if required after such review (App. 35a). If and when such changes are made by the contract parties, Mustang then must file changed rates for Commission review, and El Paso may participate in such review.[3]

El Paso also agreed to pay Mustang a monthly billing for a minimum volume charge determined by use of El Paso's annual volumes projections. This provision was intended by the parties to ensure availability of transportation capacity on Mustang's system for El Paso's protection, commensurate with market demands *and* avoidance by El Paso of payments by El Paso for El Paso's contractual take-or-pay obligations to Oklahoma producers and sellers to El Paso. Annual review of the minimum volume is contemplated, with changes to

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[2] A portion of costs applicable to a part of Mustang's system serving Mustang's other intrastate customer, Public Service Company of Oklahoma, is excluded from computations of El Paso's rates under the Mustang-El Paso agreement (App., 40a-42a). Therefore, OG&E and El Paso projected volumes and allocations of Mustang's projected costs to OG&E and El Paso are used .

[3] *See Mustang Fuel Corporation,* 19 F.E.R.C. (CCH) ¶ 61,168 (1982); *Mustang Fuel Corporation,* 20 F.E.R.C. (CCH) ¶ 61,057 (1982).

be made by El Paso from time to time (App., 6a, 25a-26a, 52a, 72a).[4]

3. *Commission Proceedings.* Mustang initiated service under Section 311(a)(2) of the NGPA for El Paso for two years on September 30, 1981, but the contract later was amended to provide for a fifteen-year service term. As required by the Regulations, Mustang filed for authorization of both short-term and long-term transportation agreements and approval of an initial rate of 22.29 cents per Mcf for the El Paso service. This rate was fixed by the allocation and rate design methods summarized, *supra* (*i.e.*, use of El Paso's and OG&E's projected transportation volumes for the next twelve months and Mustang's projected costs for the same twelve-month period) (App., 41a-42a).

In the 1981-1982 review of this initial rate, the same costs allocation and rate design methods were used by Commission Staff (App., 42a-43a). After review by the Staff and Commission, orders were issued on May 20, 1982 and July 19, 1982 approving the initial rate so fixed by this costs allocation and rate design methodology and requiring no change of the monthly minimum volume billing charge, as provided for in the contract (App., 35a-36a).[5] However, the Commission required Mustang

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[4] As the Commission record shows, El Paso initially estimated a required transportation throughput capacity on Mustang's system in excess of 200,000 Mcf per day, based upon El Paso's 1980-1982 planned system expansion and sales increases. The initial volume for a minimum volume charge, or "monthly demand charge", to be used by Mustang in monthly bills then was fixed at 130,000 Mcf per day, which is 65% of the initial El Paso planned throughput. This volume of 130,000 Mcf per day was not changed by El Paso between September, 1981 and May, 1983. The volume figure then was reduced by El Paso to 58,000 Mcf per day for the period from May 22, 1983 through April 30, 1984 (see App., 6a, n.4, 52a-54a).

[5] These 1982 orders are reported as *Mustang Fuel Corporation*, 19 F.E.R.C. (CCH) ¶ 61,168 (1982), and *Mustang Fuel Corporation*, 20 F.E.R.C. (CCH) ¶ 61,057 (1982).

(1) to make future filings annually to "justify" the El Paso rate; and (2) to use, in future filings, an assumed, "imputed" throughput volume for determining unit cost of use of Mustang's Cogar Compression Station (see App., 35a-36a, 50a-52a). Thereafter, Mustang, Staff, and the Commission all treated the four-part "give-and-take" substance of these 1982 orders as a settlement; and the Commission so refers to this approval of the initial rate as a "settlement" (App., 35a, 63a, 67a).

On September 30, 1982, Mustang filed the first of the compulsory annual petitions, providing Mustang's projected costs and projected volumes by El Paso and OG&E for the next twelve-month period and based thereon, a rate increase to 32.21 cents per Mcf, effective October 1, 1982. Prior to action on that petition, Mustang, on May 23, 1983, filed another petition required by reduction of the minimum volume used in the monthly bill to El Paso from 130,000 Mcf to 58,000 Mcf per day. Mustang also submitted projected costs and El Paso's and OG&E's projected volumes for the twelve-month period commencing May 1, 1983, which resulted in an increase in the rate to be charged El Paso from 32.21 to 34.30 cents per Mcf (App., 36a).

The Commission then initiated its "legislative-type" hearing on May 30, 1984 before a Panel of Staff personnel; and, after that proceeding and receipt by the Panel of written and oral submissions by Mustang and Commission Staff, the Commission received this Staff Panel's recommended decision, which neither Staff nor the Commission make available to an intrastate pipeline for review, comment, exceptions, response, or rebuttal (App., 36a, 58a-61a, 80a-82a).

On June 4, 1985, the Commission issued the first order on review (App., 34a) (1) directing reductions in Mustang's rates charged El Paso for both then past rate periods; (2) abrogating, retroactively to the date of initial delivery, use of the minimum volume charge in

monthly billing; and (3) ordering refunds to El Paso, with interest, of all amounts collected under that contract provision on and after September 1, 1981, and of "excess" amounts collected between October 1, 1982, and April 30, 1984, at the filed rates higher than the Commission-prescribed rates (App., 34a-62a).[6]

On questions raised by retroactive application of the new costs allocations and rate design methods, the Commission:

(1) rejected continued use of the "projected costs-projected volumes" method of allocating costs and rate design methods contemplated by contract and used to allocate costs between OG&E and El Paso, to determine unit costs and rates of OG&E and El Paso, and in the 1982 approval of Mustang's initial rates (App., 41a-42a, 50a); despite the fact that such retroactive change *in 1985* of costs allocations and rate design for October 1, 1982-April 30, 1984 came too late for Mustang to make parallel commensurate, retroactive reallocations of costs and changes of the past period rates for unregulated intrastate service for OG&E (App., 24a);

(2) adopted, and made public for the first time, a new hybrid methodology (which neither Mustang nor Staff had ever used or proposed) using a combination of "projected volumes" and Staff calculations of "actual costs" for the twelve months from October 1, 1982 through September 30, 1983 (App., 50a);

(3) adopted, at least in theory, the same newly-disclosed hybrid methodology for the second and later rate period (May 23, 1983 through April 30, 1984), but here used a mismatch of the projected volumes for the period and the same Staff's calculation of "actual costs"

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[6] As of 1986, after Commission modification of its order on rehearing, the total refunds ordered, including interest, exceeded $11,000,000 (see App., 89a, n.30).

for the twelve months from October 1, 1982 through September 30, 1983, on the asserted ground that "actual costs" for this second, later period had not been submitted (App., 40a, 69a);[7] and,

(4) determined lower unit costs, fixed lower transportation rates for the El Paso service, and ordered refunds of collections of amounts collected at the filed rates in excess of amounts computed at the Commission-prescribed rates (App. 61a-62a).

The same June 4, 1985 order set out Commission rationale for prohibiting use of the contract minimum volume billing provision, the retroactive abrogation, and the striking of the provision from Mustang's rate structure (App., 52a-57a). The Commission views were that this contract provision placed "unwarranted risks" on El Paso's interstate customers through any "underutilization" of Mustang's facilities by El Paso and operated to shift the "risk" of errors in projections of market demand by El Paso (and its customers), and of El Paso's need for transportation on Mustang's system, from Mustang to El Paso (App., 53a). The Commission reasoned that if Mustang transported lower volumes than El Paso had projected, Mustang could "overrecover" costs (App., 54a); stated that its "policy" is that interstate customers "should not bear unwarranted risk" of an interstate pipeline's underuse of an intrastate pipeline's facilities (App., 54); and asserted that in prior orders under Section 311, "minimum bills" had been rejected (App., 54a-55a).[8]

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[7] The court of appeals reversed the Commission only as to this error in use of this inapplicable, obsolete "actual cost" data for the second rate period from May 23, 1983 through April 30, 1984 (App., 24a-25a).

[8] In this June 5, 1988 order, the Commission also rejected a proposed amendment to the contract, agreed upon by El Paso and Mustang, submitted after Staff statements of position. Under this amendment, effective January 1, 1984, El Paso would have been

The Commission further found its prescribed rates "reasonably comparable" to rates an interstate pipeline would be allowed (App., 53a); denied Mustang's motion for oral argument (App., 58a-59a); and rejected Mustang arguments that procedures used deprived Mustang of a fair hearing consistent with requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (1982), the NGPA, and due process of law under the Fifth Amendment (App., 59a-61a).[9]

On July 1, 1986, the Commission issued its order on Mustang's request for rehearing and rejected most of Mustang's assertions of errors (App., 63a-91a (Commissioner Trabandt dissenting)). The Commission adhered to its retroactive application of the new hybrid methods of costs allocations and rate design, including the error of mismatches in time of projected volumes and "actual cost" data used for the second rate period, even though updated data were submitted in Mustang's request for rehearing (see App., 61a and 68a-72a).

The Commission refused to use new volume and cost data submitted by Mustang responsive to the June 5,

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given the right to make up volumes within three years of any minimum volume billing, and Mustang would have transported volumes at no additional charge to El Paso as long as El Paso also was tendering the minimum daily quantity in effect from time to time (App., 53a).

[9] Mustang asserted denials of procedural rights because of lack of opportunity for oral argument at Commission level; Commission simultaneous use of Staff personnel as "prosecutorial" or "advocacy" counsel, as members of the Panel "hearing" presentations, as witnesses before the Panel who could not be cross-examined, and as authors of the recommended decision to the Commission, which is not made public or available to parties for review, response, or rebuttal at Commission level (App., 58a-61a). *Inter alia*, the Commission cited this Court's decision in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), as support for its conclusions of no error by it and its statement that no "right to respond" exists "in an informal rulemaking" (App., 61a and n.51).

1985 order, including alternative cost-of-service presentations matching "projected costs" and "projected volumes" and "actual volumes" and "actual costs" for each rate period before the Commission (App., 68a-72a). Mustang also had submitted data showing that as a result of retroactive abrogation of the minimum volume billing contract provision, rate reductions, and refunds, the Commission violated Mustang's rights under the NGPA to recover "expenses incurred" and a "reasonable profit" and had imposed confiscatory rates (App., 82a-84a, 92a-93a). The Commission rejected these arguments and made no changes except to permit refund payments to El Paso to be spread over two years because of recognized "hardship" to Mustang of an immediate "lump sum" payment (App., 70a-72a, 82a-83a).[10]

The Commission changed its abrogation of the minimum volume charge billing provision only to rescind the abrogation for the first twelve-month period of Mustang's service for El Paso (from September 1, 1981 through September 30, 1982), which was covered and closed by the Commission's 1982 orders (App., 72a-76a). For the two subsequent periods and the future, the Commission concluded that importance of this provision to Mustang as "consideration" for the entire fifteen-year term of the amended contract was "insufficient grounds" to support it (App., 76a-77a); the abrogation, the control thereby given to El Paso, and the resultant shifts of all risks of El Paso's errors to Mustang could be minimized by "self-help" and by Mustang's filing of future rate increases with the Commission (App., 77a); and Mustang, not El Paso or its customers (who make the market and utilization projections), must bear risks of their errors in projections and any later underuse of Mustang's system by El Paso (App., 78a).

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[10] Mustang had shown in its request for rehearing that refunds under the June 5, 1985 order would exceed its then current *total annual collections* from El Paso *and* Mustang's *net income* from *all* of its services to *all* of its customers (App., 83a).

The Commission also found no "disparate treatment" by it of intrastate and interstate pipelines, or unfair discrimination against intrastate pipelines, in eliminating such provisions from rate structures (App., 78a-79a). The Commission also adhered to the conclusions in its June 5, 1985 order as to denial of due process (App., 80a-82a), and payment of interest on refunds, attributing some of its own delays to the "novel nature" of the case and "wealth of issues" raised (App., 84a-85a).[11]

3. *The Decision Below.* The court of appeals affirmed the Commission (App., 2a-31a) except to modify the Commission's July 1, 1986 order to direct the Commission to recalculate the second period rate (May 23, 1983-April 30, 1984) by use of "actual cost data" for that specific period (App., 24a-25a, 31a-33a).

After setting out a brief procedural history, statutory provisions, the regulations, and limited excerpts from legislative history (App., 2a-8a), the court did correctly state:

> "Apparently, we are the first court to consider the 'fair and equitable' rate standard of Section 311 (a) (2). Thus our review focuses on two questions: first, has FERC properly interpreted the statutory language; and second, has FERC properly applied the standard in this case?" (App., 8a-9a, n. omitted).

The court then stated that its "standard of review" is "necessarily deferential" to Commission interpretation of statutory language (App., 9a), quoting extensively from its opinion in *Martin Exploration Management Company v. FERC*, 813 F.2d 1059 (10th Cir. 1987), but noting that opinion was reversed "on other grounds" by this Court (App., 9a-10a).

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[11] The Commission also rejected an Offer of Settlement by Mustang, supported by El Paso and OG&E, but opposed by Commission Staff (App., 85a-90a).

The court found that the "fair and equitable" standard of Section 311(a)(2) is "subject to a variety of interpretations" (App., 10a), and that "neither FERC regulations nor adjudications provide a clear, concise statement of the Commission's interpretation of the statute" (App., 12a). Nevertheless, the court accepted the Commission view that Section 311(a)(2) should be implemented "through traditional cost-of-service ratemaking" (App., 12a). Then, after discussion of its perception of differences between the Commission and Mustang as to interpretation and application of the several mandatory substantive rate standards in Section 311(a)(2), the court accepted Commission "rationale" as to "risk allocation," its imposition of the risks upon Mustang, and its interpretation of the statutory standard as "reasonable" and conforming to "stated Congressional policies" (App., 13a-18a).

The court "characterized" the "dispute" over statutory interpretation and application as a "question of risk allocation" (App., 14a), on the assumption in this part of the opinion and elsewhere that Mustang seeks a "protected" "guarantee" under Section 311(a)(2), of recovery of its incurred expenses and a "reasonable profit," and a "preferred status," regardless of the obvious contract and statutory ceilings on rates filed by Mustang (App., 14a, 18a, 24a, 29a). Yet, elsewhere in the opinion, the court seems to have recognized that this was not Mustang's position, but that, by its petition for review, Mustang sought only (1) reversal of the Commission on the retroactive changes of methodology and retroactive abrogation of the minimum volume charges; (2) relief from the confiscatory refund requirements (App., 8a); (3) "opportunity for profit" as limited by the Mustang-El Paso contract and the filed rates (App., 13a); and (4) did *not* seek "rates," cost recovery, or "profit" in excess of that allowable and recoverable through those rates and the minimum charge for these past periods (App., 25a; see also App., 69a-72a, 82a).

Further, throughout its opinion, *despite plain, obvious differences in controlling language in Section 311(a)(2) of the NGPA and in the Section 4 and 5 rate provisions of the NGA*, the court based its review of this NGPA section and its approval of Commission interpretation and application of Section 311(a)(2) *solely* upon the court's interpretation of prior decisions of the courts under the NGA (App., 17a, 18a).[12] Its ultimate conclusions were the propositions that: (1) the "statute and legislative history" of the NGPA indicated "interstate ratepayers" were to be protected under the NGA and are not to bear "financial risks" of interstate pipelines' transportation agreements under Section 311(a)(2), even though Congressional intent had been read to mean that intrastate pipelines were to be encouraged to enter and "compete in the transportation market" without burdens of "full regulation" under the NGA; and (2) no "preferred status" or "financial guarantees" were intended for intrastate pipelines under the NGPA (App., 18a). Upon these predicates, the court then concluded it must "defer" to the agency interpretation of the "fair and equitable" standard and its allocation of "risks of underutilization in setting transportation rates" (App., 18a).

As its basis for all this "deference," the court of appeals stated that this Court's opinions adopt an "extremely deferential standard of review" in NGA rate cases, concluding the court, therefore, must apply "the same standard" as to whether the Commission properly applied substantive mandates and standards of Section

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[12] Among other NGA cases, the court of appeals cited, relied upon, or quoted from *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Mobil Oil Corp. v. FERC*, 417 U.S. 283 (1974); *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803 (10th Cir. 1986); and *Public Service Co. of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987). (*See* App., 17a).

311(a)(2) of the NGPA (App., 18a-19a). This Court's opinions, under the NGA, so read and deemed controlling, then were said to require a "presumption of validity", impose a "heavy burden" upon any petitioner, direct no court obligation to examine "each detail" of a rate order, and hold that judicial inquiry ends if "total effect" of a rate order appears not "unjust" and "reasonable" (an NGA Section 5 standard), but judicial review does permit inquiry as to whether "essential elements" of a rate order are supported by "substantial evidence" (App., 19a).[13]

Under its readings of these NGA case opinions as to "standards" of review and its own functions, the court of appeals then deferentially affirmed the sudden Commission changes of methodology and use of the hybrid combination of "projected volumes" and "actual costs" to test and fix rates, and rejected Mustang's objections to these parts of the Commission's orders. However, the court did state:

> "While we might view the question differently than FERC, the Commission's decision is supportable." (App. 21a).[14]

The court of appeals further (1) held there had been no unlawful "retroactive ratemaking", relying upon its decision as to Section 4 of the NGA in *Colorado Interstate Gas Company v. FERC*, 791 F.2d 803 (10th Cir.

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[13] The court of appeals did not state or mention that *each* of the major opinions in NGA cases it cited, relied upon, and "adopted" were in cases, unlike Section 311(a)(2) procedures, in which adjudicatory hearings had been held before the Commission under the NGA and the APA, findings of fact were made upon the basis of a record so developed, and "evidence," considered "substantial" or otherwise, was available in records so developed by the agency to be reviewed by Courts on the basis of such records.

[14] As stated by the court below: "Normally, because rates are calculated prospectively, regulations use projected cost and volume data." (App., 23a, n.16).

1986) (App., 22a-23a); (2) found no error in retroactive abrogation of the contractual minimum volume billing charge; (3) "found no reason to review the history of FERC's minimum bill policy," and did not refer to or apply any applicable NGA precedents or accord any weight to the Commission's concession that it had permitted such charges for "interruptible" and "firm" service by interstate pipelines (App., 27a-28a) and now allows economic equivalents of such charges as "standby" charges (App., 28a-29a): (4) held the refund order not to be "confiscatory" or "unconstitutional" (App., 29a); (5) upheld the imposition of interest on refund principal amounts (App., 29a-30a); and (6) found no denial by the Commission of procedural due process of law (App., 31a).

REASONS FOR GRANTING THE PETITION

This case presents important questions of first impression in construction and application of substantive rate standards for intrastate pipeline transportation of natural gas under the Natural Gas Policy Act of 1978. The questions presented were wrongly decided by the Tenth Circuit in this first judicial review of Commission-prescribed rates under Section 311(a)(2) of the NGPA. The decision below is contrary to the intent of Congress in enacting Section 311(a)(2) and approves confiscatory rate and refund orders which violate the NGPA and constitutional requirements in federal rate regulation.

Consideration and decision by this Court, at the earliest possible date, are warranted fully because of importance of these questions in rate regulation under this NGPA section. This section was intended to move the natural gas industry rapidly toward full integration of intrastate and interstate natural gas transportation systems, for the benefit of interstate markets, by encouraging commitments by intrastate pipelines to long-term

services and transactions with interstate pipelines and local distribution companies, even though certain intrastate pipelines' transportation rates would be subjected to Commission review and modification under Section 311 (a) (2).

In this first judicial review, the court of appeals erred in affirming Commission statutory interpretation and application of the rate tests mandated by Congress in Section 311(a)(2); in interpreting and applying, as "borrowed" controlling precedent, constructions of the NGA by this Court; and in similarly "borrowing," as controlling precedent, Tenth Circuit constructions of the Natural Gas Act which are in conflict with constructions of the same section of that statute by the District of Columbia Circuit. The Tenth Circuit also has affirmed orders directly in conflict with the Congressional mandates in Section 311(a)(2) for "fair and equitable," non-discriminatory treatment of intrastate pipelines, which direct the Commission to permit intrastate pipelines providing the sought-for service to and for the interstate market, rates "reasonably comparable" to those of interstate pipelines providing similar service.

I. Importance of Section 311(a)(2) of the NGPA.

In so affirming Commission orders requiring refunds by an intrastate pipeline for transportation for an interstate pipeline, the court of appeals' errors were its (1) absolute failure to assess aggregate total impact and end results of the orders under statutory and constitutional requirements; (2) misconstruction and misapplication of the decisions of this Court as to statutory and constitutional requirements in rate cases under the NGA, which the court below borrowed and treated as controlling upon the NGPA rate standards; and (3) similar error in borrowing and treating as controlling, the Tenth Circuit constructions of Section 4 of the NGA in conflict with those

of the District of Columbia Circuit and parallel, comparable sections of the Federal Power Act ("FPA").[15]

Such an opinion cannot be reconciled with any of the directives of Congress to the Commission in Section 311(a)(2) of the NGPA that the Commission "shall" allow intrastate pipelines "fair and equitable" rates and provide the opportunity to recover "expenses incurred," a "reasonable profit", and charges of amounts "reasonably comparable" to the allowances permitted in interstate pipelines' rates for similar service.

Section 311(a)(2) is the linchpin provision in the NGPA enacted in 1978 to further now well-canvassed efforts of Congress and the Executive Branch to minimize future shortages of natural gas in interstate markets, including the integration of services by interstate pipeline networks with services by separate, but substantial intrastate pipeline transportation systems. *See*

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[15] The Tenth Circuit's October 17, 1988 opinion in this case obviously predates this Court's opinion in *Duquesne Light Co., et al. v. Barasch, et al.*, —— U.S. —— (No. 87-1160, January 11, 1989). That decision is not decisive as to any questions presented in this Petition because of the errors of the Tenth Circuit.

This case does not involve a state-regulated utility and involves no questions as to statutory or constitutional requirements for inclusion of "costs" of facilities *not* "used and useful" in the intrastate pipeline's service for its interstate customer. The questions raised by the errors below also are *not* limited to impact of inclusion or exclusion of but one or more components of allowable costs or provisions for rate design.

This Court's holdings in *Duquesne* refer to applicable duties of a reviewing court upon challenges of rates as confiscatory and violative of statutory and constitutional requirements, and, in large part, are based upon this Court's earlier opinions in federal rate regulation cases, including opinions in the landmark precedent cases arising under the NGA. These are *the very same decisions* misconstrued and misapplied as to the NGPA by the court of appeals in this case (*e.g., Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944), and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)). See App., 10a-11a n.8, 17a, 19a, 29a.

H.Rep.No. 95-543, 95th Cong., 1st Sess. 45 (1977), *reprinted* in 1978 U.S. Code Cong. & Admin. News 7712.

Congress accorded intrastate pipelines immunity from the pervasive, costly regulation of interstate pipelines under the NGA; precluded pre-emption and federal control of wholly intrastate service; and fashioned new, different substantive rate standards and mandates to the Commission limiting its "discretion." Congress intended thereby to encourage intrastate pipelines to participate, for the first time, as transportation links essential to providing interstate pipelines and others in the interstate market access to intrastate producer sales markets, previously completely closed to all interstate purchasers and free of the burdens of NGA regulation, controls, requirements for rate reporting and other detailed obligations and stringent burdens imposed upon interstate pipelines, under the NGA. (*Ibid.*)

Consistent with Congress' objectives, Section 311 (a) (2) has borne such fruit during the decade since December 1, 1978. While no statistics of totals are available to this Petitioner, Commission orders over the past seven years show that a significant number of intrastate pipelines—both small and large—have entered service for the interstate market under Section 311(a) (2) and undertaken and continue service for interstate carriers and customers, broadening available domestic supply sources for interstate consumers. Many of these intrastate pipelines, like Mustang, are not state-regulated and, therefore, have no choice but to submit petitions to the Commission for rate approval (see citations to some of these Commission orders under Section 311(a) (2) of the NGPA at App. 13a, 21a, 28a, 39a, 46a, 48a, and 61a).

Nevertheless, over the years since December 1, 1978, the Commission has failed to apply Section 311(a) (2) consistently; has waffled in rulings; has published no

clearcut guidelines publicly available to intrastate pipelines; has approved or disapproved components of rate structures inconsistently; has switched from one methodology to another, with both retroactive and prospective application, to reach the desired result of rate reductions; and, finally, in this case, has entered these 1985 and 1986 orders that, contrary to the NGPA directives, (1) preclude recovery of "expenses incurred" and a "reasonable profit"; and (2) require confiscatory refunds that in 1985 and 1986—the years most affected—exceeded the intrastate pipeline's annual collections for its *interstate* service *and* its net income, on an annual basis, from *all interstate* and *intrastate* services (see App., 83a, 92a-93a).

By any rational measure, such orders cannot be found to be "fair" or "equitable," or consistent with Congress' directives, or reconciled with treatment of *interstate* pipelines under the NGA by the Commission and the Courts. Such orders would not be "lawful" and "nonconfiscatory" under statutory and constitutional requirements under the NGA, as construed and applied in the opinions of this Court and courts of appeals, and cited below as controlling for this NGPA section, but then misread and misapplied. However, despite its errors, the Tenth Circuit *was* accurate as to Commission performance since December 1, 1978: after stating that ". . . the 'fair and equitable' standard in Section 311(a)(2) is subject to a variety of interpretations" (App., 10a), the court of appeals said:

> "Unfortunately, however, neither FERC regulations nor adjudications provide a clear, concise statement of the Commission's interpretation of the statute." (App., 12a)

Yet now, the Tenth Circuit's approvals in this case of Commission interpretations and application of Section 311(a)(2), and of the confiscatory end results, stand as controlling precedent for application to rates filed under

Section 311(a)(2) unless this Court intervenes and corrects the errors of the court of appeals. Leaving the court of appeals' opinion standing, without modification, can only repel or retard enticement of intrastate carriers into transactions subject to Commission control, and impair and interfere with more recent, increased Commission efforts to integrate the two markets and foster competitive carriage, compensatory rates, and increased domestic supplies to avoid future shortages. *See, e.g., Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1468 (1988).

In addition to the confiscatory impact upon Petitioner, these considerations further fully warrant review by this Court now and an authoritative answer to questions of (1) correctness of the Tenth Circuit's wholesale borrowing and erroneous application of NGA precedent to create interpretations of Section 311(a)(2) standards which are not consistent with Congress' intent in 1978; and (2) the degree of protection for intrastate pipelines from confiscatory rate orders and the ordering of payments of confiscatory refunds. Congress did *not* intend Section 311(a)(2) to be emblazoned with "abandon all hope, ye who enter here," but the Tenth Circuit now has nailed up that sign, to be read by all intrastate transportation pipelines considering transactions subject to Commission-prescribed rates under Section 311(a)(2).

II. Erroneous Interpretations and Applications of Decisions of This Court.

The Tenth Circuit apparently purported to apply (1) principles of statutory construction set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985) (App., 9a-10a); and (2) standards of

review and tests of rates under the NGA standards and constitutional requirements set out in *FPC v. Hope Natural Gas Company*, 320 U.S. 391 (1944), and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (App., 17a, 19a, 21a, 29a). The court has erred in all respects, by misinterpreting and misapplying this Court's opinions, and these errors undermine each part of the structure of the court of appeal's opinion.

A. As to construction of the NGPA, despite Congress' meticulous efforts to craft entirely different substantive standards (App., 3a-5a), the court of appeals, throughout its opinion simply "borrowed" NGA precedent and the "principles" it derived from NGA cases (App., 17a, 19a, 22a-23a).

Congress wrote plain, *unambiguous* language (*i.e.*, "recovery" of "expenses incurred" and "opportunity" for a "reasonable profit"). Yet, the court of appeals found "ambiguity" in the rate standards of Section 311 (a)(2) where there is none; and then blindly accepted Commission "interpretation," despite the court's own statement that the Commission has never provided industry, customers, or a court with ". . . a clear, concise statement of the Commission's interpretation of the statute" (App., 12a).

The court's path of review of this statutory section thus was not in accord with the steps and principles set out in the *Chevron U.S.A., Inc.* and *Chemical Manufacturers Association* opinions (App., 9a-18a). The ultimate unwarranted, supine "deferential" acceptance of Commission ambiguous, vacillating, shifting "interpretation," therefore, was neither "reasonable," nor in conformance with "stated Congressional policies" at all (App., 18a).

B. As to Commission "application" of Section 311 (a)(2) and substantive statutory and constitutional tests of validity of rate orders, the Tenth Circuit did not, in

fact, apply the cited *Hope* and *Permian* criteria (*cf.* App. 14a, 17a-18a, 22a-24a, 26a-28a, 29a-30a).

Early on, the court mischaracterized Mustang's position as to the rate changes of methodology of costs allocations and rate design, and retroactive application of these changes, as merely a "dispute" over "risk allocation" (App., 14a). Later, the court again erroneously accorded undue and further "deference" to the 1985 and 1986 Commission unveiling of its "apples and oranges" mismatch of "projected volumes" and "actual costs," first announced on June 5, 1985, and then applied retroactively to the rate periods from September 1, 1982 through April 30, 1984 (App., 23a n.18).

On this issue, the court of appeals never recognized the reality that before it was a precise question, now presented here, of the type referred to by this Court, but not presented or decided, in *Duquesne Light Co., et al v. Barasch, et al.*, —— U.S. —— (No. 87-1160, January 11, 1989):

> ". . . a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions" (Slip op., 14-15).

So it is here. Agency orders have shoved upon an intrastate pipeline 100% of the financial impact of El Paso's, and its customers' misjudgments of their markets and errors in their projections between 1982 and 1985, forcing the intrastate pipeline to bear the "risk" of such past, current, or future mistakes by the interstate pipeline and its customers in projecting market demands and transportation requirements. The orders also have been issued and applied to past periods when it is far too late for commensurate changes of unregulated intrastate rates by the intrastate pipeline for these past

periods;[16] strip the intrastate carrier of any minimum volume billing protection, even though the interstate customer contracted to pay such a charge to assure available capacity and to protect *itself* under its own take-or-pay obligations; and the methodologies, however judged and regardless of "theory," produce rate reductions and confiscatory refunds. Neither *Hope* nor *Permian* condones judicial blessing of such "end results" under the NGA. Such aggregate impacts and end results likewise also have no "rational" basis or valid "rationale" under Congress' mandates to the Commission in Section 311 (a) (2) of the NGPA.

The last question before the Tenth Circuit, in addition to questions of lawfulness of "components" or "elements" of the Commission orders, was the question of lawfulness of the aggregate impact, the ultimate "end result", and the culmination of all parts of the orders in the directive for payment of refunds by Mustang to El Paso. (App., 2a, 8a. 29a). The court of appeals did not give this major, controlling question any consideration on the merits, erroneously treating the issue as "foreclosed" by this Court's *Permian* opinion (App., 29a). This is the nadir of misinterpretation of the *Permian* opinion, which did not say what the Tenth Circuit concludes or so remove *Hope* from the viable, vital precedents of this Court in rate regulation.

Thus, on the most vital question before it, which also is most significant under *Hope*, *Permian*, and the Fifth Amendment, the court wrote but two paragraphs. One sets out an inaccurate effort to summarize the issues

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[16] This impact upon Petitioner was ignored below, but compare that with protection accorded a utility in *Nantahala Power and Light Company v. Thornburg*, 476 U.S. 953, 970-972 (1986), and an interstate pipeline in *Colorado Interstate Gas Company v. FPC*, 324 U.S. 581 (1945) (". . . considerations of fairness, not mere mathematics, govern the allocation of costs", 324 U.S. at 591).

raised by Mustang; and the other sets out a quotation from *Permian* and the court's erroneous conclusion therefrom (see App., 29a, first two paragraphs under heading "IV"). Yet, Mustang's submissions before the Commission showed, despite any quibbling over specific cost components for specific periods, that Mustang had been denied all "opportunity" for recovery of "expenses incurred" and a "reasonable profit" for the two periods from September 1, 1982 (the commencement of the first of the two rate periods involved in this case) through April 30, 1984 (the date prior to effectiveness of the required 1984 annual filing, which was effective May 1, 1984, and is still pending before the Commission).[17]

In sum, the court of appeals simply did not consider or apply the tests of *Hope* or *Permian* to the facts of the case, or examine the very real confiscatory financial impact and confiscatory "end result" of the orders. Yet, as *Duquesne* illustrates, *Permian* did not "foreclose" the inquiry required by the *Hope* test. Therefore, the court of appeals clearly erred, and, most important, leaves as controlling precedent, its conclusion that "the same reasoning applies to fair and equitable rates under Section 311(a)(2)" (App., 29a).

The "end result" thus was never "foreclosed" below, and, for all practical purposes, the court never addressed the question of confiscatory rates and refund orders on the merits. These errors as to *Permian* and *Hope* can be corrected only by this Court. Otherwise, the only controlling judicial precedent for Section 311(a)(2) of the NGPA will stand with a holding that, in effect,

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[17] Significantly, the Commission itself did recognize that it had ordered refunds estimated to exceed Mustang's gross revenues from service for El Paso and net income from *all* transportation services in 1986 (App., 83a).

says the *Hope* test inquiry does not apply because this Court in *Permian* "foreclosed" that very inquiry under the NGA—a "conclusion" now borrowed and treated as controlling for application of NGPA Section 311(a)(2) rate standards.

III. Courts of Appeals Conflicts.

On two major questions, the conclusions of the Tenth Circuit also cannot be reconciled with decisions of the District of Columbia Circuit.

A. As shown, the Tenth Circuit upheld the Commission as to retroactive application of its new hybrid mixture of "projected volumes" and "actual costs" by applying its own construction of Section 4 of the NGA in *Colorado Interstate Gas Company v. FERC*, 791 F.2d 803 (App., 22a-23a). There, in a case also involving retroactive abrogation of a minimum bill, the Tenth Circuit held that the Commission could enter certain "retroactive" orders under Section 4 of the NGA, citing and relying heavily upon its reading of *City of Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982) (791 F.2d at 807).

On December 13, 1988, the D.C. Circuit reversed the Commission in two similar cases involving Section 4 of the NGA, retroactive orders, minimum bills, related rate components, and interstate pipelines' rate filings under Section 4 of the NGA. *ANR Pipeline Company v. FERC*, —— F.2d —— (Nos. 87-1340, 88-1030, D.C. Cir.), and *East Tennessee Natural Gas Company v. FERC*, —— F.2d —— (No. 87-1765, D.C. Cir. 1988). In *East Tennessee*, the D.C. Circuit discussed its *City of Batavia* opinion extensively, and expressly stated that the Tenth Circuit had misinterpreted that opinion and applied it far too broadly in the same Tenth Circuit *Colorado Interstate* opinion relied upon in this case by the Tenth Cir-

cuit as controlling on the questions of validity of the retroactive impact of the Commission orders.[18]

The impact in law is that there are and will be differing answers in different Circuits when "principles" applicable under Section 4 of the NGA are applied under Section 311(a)(2) of the NGPA to answer the question of Commission power to change retroactively a part of an existing rate structure not placed in issue by a rate filing (such as the minimum volume charge in this case). According to the D.C. Circuit in *East Tennessee*, the Commission can order only a *prospective* change of such a component and cannot order "retrospective" or "retroacitve" changes, but the Tenth Circuit says the opposite.

Also, according to the D.C. Circuit, the Fifth Circuit would agree with the D.C. Circuit but the Third, Tenth, and Eleventh Circuits would not. See *East Tennessee* (slip op., pp. 18-21 and particularly n.15 and n.16 and *Laclede Gas Company v. FERC*, 670 F.2d 38 (5th Cir. 1982)). Here, the Tenth Circuit obviously approved retroactive abrogation of the minimum volume bill provision on the basis of its NGA "precedent" in *Colorado Interstate*, while, in the D.C. Circuit, the Commission would be reversed as to the *retroactive* change, as it just was in the *ANR* and *East Tennessee* cases (and also apparently would be in the Fifth Circuit).

B. The Tenth Circuit's errors in interpretation and application of *Permian* and the failure to perform its duty under the *Hope* precedent (App., 17a, 19a, 29a) also are in conflict with constructions and application of *Hope* and *Permian* in the *en banc* opinion in *Jersey Central Power & Light Company v. FERC*, 810 F.2d 1168 (D.C. Cir. 1987), a case arising under provisions

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[18] The D.C. Circuit noted that while the Fifth Circuit's construction of Section 4 of the NGA is consistent with its own, the Third and Eleventh Circuit, as well as the Tenth Circuit had misconstrued and misapplied *City of Batavia*.

of the Federal Power Act ("FPA"), then directly comparable to the provisions of the NGA held by the Tenth Circuit to be controlling as to "interpretation" and "application" of Section 311(a)(2) of the NGPA.

In *Jersey Central*, the D.C. Circuit carefully examined what had been done by the Commission as to components of a rate structure; applied and directed meticulous application of "prongs" of the *Hope* and *Permian* tests as to financial impact upon a regulated company, its investors, and its equity owners; and emphasized obligations of both the agency and the courts to examine, with a high degree of care, claims of imposition of confiscatory rates, violative of the Fifth Amendment, by the Commission (810 F.2d at 1175-1188). Here, however, as shown *supra*, the Commission and the court of appeals both simply brushed aside Mustang's showings as to the drastic financial impact upon it of the refund orders; and the court of appeals erred to even greater degree in its erroneous conclusion that this Court, in *Permian*, has "foreclosed" the very meticulous inquiry into allegations of financial and confiscatory impact and "end results" that the D.C. Circuit held, in *Jersey Central*, to be required, under the *Hope* test.

The Tenth Circuit's error can only be compounded by the precedent of its holding that this "foreclosure" reading of *Permian* ". . . applies to fair and equitable rates under Section 311(a)(2)" (App., 29a). Only this Court can now correct this standing, controlling interpretation, which plainly rests upon errors as to this Court's holdings in the NGA cases and which are in conflict with the D.C. Circuit's correct interpretations and applications of the same decisions of this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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